No. 10437.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RICHFIELD OIL CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside and on Request for Enforcement of an Order of the National Labor Relations Board.

REPLY BRIEF FOR THE RICHFIELD OIL CORPORATION.

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REPLY BRIEF FOR THE RICHFIELD OIL CORPORATION.

In its brief, the Board contends that anything which it or the unions consider necessary for the fullest enjoyment of union benefits must, by implication, be guaranteed by the Act. This reply brief is submitted to present petitioner's argument as to certain matters which we think

require further discussion in the light of the Board's brief and in this connection we make the following points:

1. Petitioner is asking this court to decide only questions of law and not questions of fact as the Board seems to think.

2. The Board's brief distorts petitioner's contentions and throws an improper light upon petitioner's position.

3. The judicial authorities cited by the Board, when properly construed, actually support petitioner's position.

4. If the Board's position is sustained, there can be no collective bargaining concerning grievances.

5. Our contention that the Board disregards judicial interpretation of the Act is confirmed by a new case.

ARGUMENT.

Point I.

This court has not been asked to determine whether it is a fact:

1. That seamen have waged a long and bitter struggle to better their conditions, as recited in the *Encyclopaedia of the Social Sciences,* Vol. 13, p. 613; *Report of the Maritime Labor Board to the President and the Congress, March 1, 1940,* p. 26; *R. W. Wissman, The Maritime Industry,* p. 3 (cited in the footnote on page 6 of the Board's brief).

2. That the grievance procedure is an important contract provision, as recited in *R. W. Wissman, The Maritime Industry.* pp. 73-74; *Clinton S. Gilden and Harold J. Ruttenberg, The Dynamics of Industrial Democracy,* p. 43; The Twentieth Century Fund, *How Collective Bargaining Works* (cited in the footnote on page 9 of the Board's brief).

3. That some or a majority of shipowners have the particular grievance procedure described by the Board, as suggested in *Report of the Maritime Labor Board to the President and to the Congress, March 1, 1940,* pp. 189-192; *R. W. Wissman, The Maritime Industry,* pp. 74-75; *Hearing Before the Committee on Merchant Marine and Fisheries, House of Representatives, 75th Congress, 1st Session,* on *H. R. 5193,* p. 73; *Maritime Labor Grows Up, Frank M. Kleiler; Survey Graphic,* January, 1939, p. 19 (cited in the footnote on page 11 of the Board's brief).

4. That it is inconvenient for seamen to take an active part in union affairs as described in *N. L. R. B. v.*

Cities Service Oil Co., 122 F. (2d) 149 (cited in the footnote on page 12 of the Board's brief).

On the contrary, this court is being asked to decide the questions of law discussed in petitioner's main brief, the basic question being whether, as a matter of law, an employer that has not been charged with discrimination, failure to bargain, or any improper motive or intent, violates Section 8(1) of the Act, when, during contract negotiations carried on in good faith with certified bargaining agents of its employees, that employer refuses to accede to the bargaining agents' demand that the contract include a particular provision under which union representatives would be given free access to that employer's vessels.

Point II.

The Board's assertion that your petitioner contends that the adjustment of grievances is not a part of the practice and procedure of collective bargaining protected by the Act is a misstatement, for throughout the entire proceeding before the Board and before this court, your petitioner has contended that the grievance procedure is properly a subject of collective bargaining and that the Board has interfered with that collective bargaining by dictating just what procedure shall take place in the settlement of individual grievances. The fallacy of the Board's argument becomes apparent by the most cursory examination of the record. The grievance procedure contained in the Associated Oil Company contract (pp. 11-12 of Appendix to Petitioner's main brief) is the grievance procedure which the parties had tentatively agreed upon before this proceeding was instituted and is the grievance procedure which is now incorporated in the signed con-

tract between the parties. That grievance procedure specifically provides for the participation in the handling of individual grievances by the certified bargaining representatives of the employees.

Not only has the Board repeatedly distorted your petitioner's contention but it has made a studied effort to cast upon your petitioner's conduct an improper light which, we are convinced, can have but one purpose—the creation in the court's mind of an impression that your petitioner is a vicious employer bent upon destroying rights created by the Act and using every conceivable means to frustrate enjoyment by its employees of such rights. For example, on page 18 of its brief, the Board states that:

> "Petitioner's stress upon the role of the ship's delegate is a significant reflection of its attitude toward bargaining with the Unions."

On page 13 of its brief, the Board asserts that the denial of passes would put your petitioner in a strategic position to hinder union activity and insinuates that your petitioner would not be slow to take advantage of that power. The Board then cites a number of cases in its footnote having to do with employers who had excluded union representatives from "company towns." It is significant that in each one of the cases cited the Board's complaint alleged discrimination and a failure to bargain and found such violations upon substantial evidence, and in this connection found that those employers had been resorting to every conceivable means of frustrating legitimate union activity.

On page 23 of its brief, the Board asserts that your petitioner's conduct tends to frustrate the aim of the statute.

Such assertions, in view of the fact that your petitioner has not been charged with any such conduct and the fact that there is not one scintilla of evidence in the record from which any such conduct can be inferred (to say nothing of its long-established fair labor policy and peaceful relations with organized employees, including the labor organizations involved in this case), forces us to conclude that the Board recognizes the invalidity of its order and is attempting to becloud the issue.

Point III.

The Board cites a number of judicial authorities in support of several propositions. As a matter of fact, when these authorities are properly construed, they support your petitioner's contentions. This will be obvious from an examination of the cases and we review them briefly as follows:

1. Each of the several cases cited in footnote 16 on pages 13-14 of the Board's brief involved findings, supported by substantial evidence, of a long record of anti-labor activity with the intent and purpose of destroying employers' rights conferred by the Act. In the case now before the court, your petitioner has not been charged with any such intent or purpose and no evidence thereof was introduced.

In *N. L. R. B. v. The Denver Tent & Awning Co.*, 13 L. R. R. 284, C. C. A. 10, October 25, 1943, the court did not find the rule adopted by the employer to be an unfair labor practice because the rule interfered with union activity but because *there was evidence that the rule was merely a device to restrict or impede employees in the exercise of their rights of self-organization.* In

other words, the improper intent and purpose was there, but it is missing in the case now before the court.

In the *Midland Steel Products Co.* 113 F. (2d) 800, case, cited in the *Denver Tent & Awning* case, the court specifically held that if the rule was reasonable *and not for an ulterior purpose, it did not violate the Act* even though it did prevent union activity.

In *N. L. R. B. v. William Davies Co.,* 135 F. (2d) 179 (C. C. A. 7), the court upheld a rule excluding solicitation of membership on company premises.

2. On page 23 of the Board's brief it cites the *H. J. Heinz Co.* case, 311 U. S. 514; the *P. Lorillard Co.* case, 117 F. (2d) 921, 924 (C. C. A. 6), and the *Biles-Coleman Lumber Co.* case, 98 F. (2d) 18, 22 (C. C. A. 9), upon the propositions that the employer must:

(a) Sign a contract embodying the provisions of his agreement reached, even though the Act does not expressly impose such an obligation on him;

(b) Cooperate to a reasonable extent with the accredited bargaining agent in facilitating the bargaining process; hence, must make his representatives available for bargaining conferences at reasonable times and places; and

(c) Be sincere in his bargaining negotiations.

Not one of these cases is relevant or material to the issue in this case. The agreement between the complaining unions and petitioner has been reduced to writing and signed; your petitioner has at all times facilitated the bargaining process and has furnished reasonable times and places for conferences; and it has been most sincere in its negotiations. The grievance procedure adopted re-

quires *immediate* satisfaction or reference to the shore representatives of the employer and the union, where satisfaction must be given *within 24 hours.*

Petitioner's cooperation and sincerity of purpose has not been confined to the writing of the original agreement, but is the general policy and practice of your petitioner. Furthermore, the complaint has not alleged and the Board has not found any failure to bargain in good faith with sincere purpose.

3. Carrying this proposition a step further, the Board, on page 23 of its brief, cites the *Art Metals Const. Co.* case, 110 F. (2d) 148 (C. C. A. 2), on the proposition that because the Board has the power to order an employer to enter into a written agreement embodying the matters agreed upon when the Act does not specifically require a written agreement, that therefore the Board also has power to require an employer to embody in that contract provisions not specifically required by the Act. If this is the law, then there is no such thing as collective bargaining. We submit that this case is authority for your petitioner's position. Note what the court said on page 150:

> *"The freedom reserved to the employer is freedom to refuse concessions in working conditions to his employees, and to exact concessions from them; it is not the freedom, once they have in fact agreed upon those conditions, to compromise the value of the whole proceeding, and probably make it nugatory."* (Emphasis ours.)

4. *Warner v. Goltra,* 293 U. S. 155, 156, 158, is cited on page 23 of the Board's brief, upon the proposition that the Board has power to do what was reasonably contemplated by the Act. It should be noted that in the *Warner*

case the court was construing a particular word in the statute. In the case now before the court, we are not finding fault with the language of the Act but with the Board's action in interfering with the undisputed right of employees and the duty of employers to bargain collectively.

5. On page 8 and page 25 of the Board's brief, the Board distorts petitioner's position and then cites *N. L. R. B. v. Newark Morning Ledger Co.,* 120 F. (2d) 262, 266, 267 (C. C. A. 3), cert. denied 314 U. S. 693, as rejecting said distorted position. Petitioner's contention before the Board and now before this court is that the method of settling grievances is the subject matter of collective bargaining and that when the parties have agreed upon the procedure, that procedure governs. The court in that case did not hold that the settling of grievances was part of the collective bargaining process, but that the rights conferred by the Act continued after the execution of the contract.

The Board also cited in support of this proposition *N. L. R. B. v. Sands Mfg. Co.,* 306 U. S. 332, 342. We cannot see where the Board gets any help there for the court said on page 342:

> "The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees *to the end that employement contracts binding on both parties should be made.* But we assume that the Act imposes upon the employer the further obligation to meet and bargain with his employees' representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation, *if there is any doubt as to its meaning.*" (Emphasis ours.)

6. In *National Licorice Co. v. N. L. R. B.,* 309 U. S. 350, cited by the Board on page 27 of its brief, the employer had entered into individual contracts with his employees requiring them to renunciate several of the rights conferred upon them by the Act. In this connection the court said that the clause in the particular contract, discouraged, if not forbade, any presentation of grievances through a labor organization or chosen representatives of the employees. In the case now before the court the parties have agreed upon a procedure in which the employee can take his grievances up in the first instance through a representative of a labor organization and throughout the entire grievance procedure the labor organization plays a major part.

7. The citation on pages 23 and 24 of *H. J. Heinz Co. v. N. L. R. B.,* 311 U. S. 514, 524, 526, purporting to expose the fallacy of petitioner's argument can give the Board little comfort for it actually is very good authority in support of our contention. Note that the court, after considering the House Committee's recommendations, state that it has long been recognized that the signing of an agreement was the *final step* in the bargaining procedure. The court unequivocally held that Congress intends that employers shall be free to bargain concerning important contract provisions, saying:

> "the freedom of the employer to refuse to make an agreement relates to its terms in matters of substance."

That is exactly petitioner's position, for even the Board will agree that the grievance procedure is a matter of substance and it follows that Congress did not intend that the *Board* should take it upon itself to dictate what specific grievance procedure should be incorporated in a

written agreement any more than it gave to the certified unions the power to say how grievances shall be settled. Moreover, Congress did not intend that the Board should have the authority to nullify a grievance procedure agreed upon by the employer and bargaining agents by prescribing still another method conflicting therewith.

8. *N. L. R. B. v. W. C. Bachelder,* 120 F. (2d) 574 (C. C. A. 7), cert. denied, 314 U. S. 647, holds that the Act contemplates that there is a duty on both sides to enter into discussion with an open and fair mind

> "and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor, and if found to embody it in a contract as specific as possible, which shall stand as a mutual guaranty of conduct, and as a guide for the adjustment of grievances."

This holding is not contrary to petitioner's position and it is not even material for there is no question of a failure to bargain in the case now before the court.

9. We think that the Board's view of the decision of this court in the *N. L. R. B. v. North American Aviation* case, 136 F. (2d) 898 (C. C. A. 9), referred to on pages 28 and 29 of the Board's brief, is a significant example of the Board's amazing versatility in adopting changed positions as expediency might demand. In that case, the Board reasoned that collective bargaining agents are exclusive bargaining agents; that grievances are proper subjects of collective bargaining; therefore, such agents have the exclusive right under the Act to settle individual grievances and that any other method afforded by the employer is an interference with the right of employees to have their chosen representatives bargain for them concerning grievances.

Now it was the Board's fallacious reasoning and not the statute that created that alleged right. In that case, the statute contained an express prohibition. In the case now before the court the Board's fallacious reasoning has again created the same alleged right. It is true in this case that the Act does not have an express prohibition concerning the results which the Board seeks to accomplish by its reasoning, but the Act, as construed by the courts, provides that an employer is not required to agree to a particular term or condition of employment. This, we think, is just as effective a limitation upon the Board's asserted power as an express prohibition in the statute and it will be observed that in both cases the Board has applied exactly the same reasoning up to the point of creating an alleged right. In the *North American* case the Board held that the granting of another grievance procedure interfered with that right and was therefore an unfair labor practice. In this case, the Board reasons that the refusal to issue passes interferes with that same alleged right and is therefore an unfair labor practice.

Clearly, if the Board is not deterred by a limitation upon its power expressed in the statute, the Board cannot be expected to be deterred by a limitation arrived at through judicial interpretation of the statute.

10. Under Point II of the Board's argument, on page 30 of the Board's brief, the Board simply asserts that it considers its order not to be too broad, and cites *N. L. R. B. v. Express Publishing Co.,* 312 U. S. 426, 436. Obviously, the Board is not seriously contending this point, and the authorities (including the *Express Publishing Co.* case) cited in petitioner's main brief clearly established that the Board's order is too broad.

Point IV.

If the Board's position is sustained, there is no such thing as collective bargaining concerning grievances, for regardless of what procedure might be formally incorporated in the contract, the unions would still have the right to ignore that procedure and establish a different procedure (for the Board says that they have this right), thereby making the negotiations concerning the procedure to be incorporated in the contract an idle act and a waste of time.

We submit that the purpose of the Act was to encourage collective bargaining to reduce the obstructions to interstate commerce resulting from disputes. It seems obvious that if the parties, as the law contemplated, can mutually agree upon a procedure to be followed, that the parties in all probability will follow that procedure in good faith, with the result that grievances will be satisfactorily settled, thereby reducing the amount of strife between the parties. The Supreme Court recognized this principle when it held on page 45 in the *Jones & Laughlin Steel Co.* case, 301 U. S. 1:

> "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."

We think the Circuit Courts, including this Circuit, are in accord. Note what the Sixth Circuit Court said in *N. L. R. B. v. P. Lorillard Co.,* 117 F. (2d) 921, beginning on page 923:

> "The Board is not authorized, by statute or court decision, to shape or control the course of the nego-

> tiations between employer and employee, so long as the employer bargains collectively, in accordance with the statute. * * * Collective bargaining requires negotiations by the employer with representatives of the employees, chosen by themselves, freely and without coercion, *and has no reference to the terms of the agreement offered so long as the parties negotiate in good faith with the view of reaching an agreement.*" (Emphasis ours.)

We think it equally obvious that if, on the other hand, the employer and employees are deprived of the right to bargain concerning how grievances shall be settled, the Board in denying that right, is actually frustrating the purpose of the Act.

Although the Board's order in this case is alleged to be primarily for the purpose of guaranteeing free collective bargaining concerning the settlement of grievances, the Board also asserts that so-called "access" is necessary to full enjoyment of the mutual aid and protection provisions of the Act, more specifically, the right to have dues collected on board ship and to have union papers distributed on board ship. In taking this position the Board is actually granting new, novel and special privileges to certified unions and discriminating against minority groups among the employees, for the Board has denounced as being without merit the contention of your petitioner that if these privileges are granted to the certified unions the same privileges must be granted to other unions. Other discrimination also is apparent, for the Board has emphatically stated that the collection of dues on board ship *by shore representatives of the union* is necessary for employees to enjoy the benefits of union membership, but

the Board has, with equal emphasis, stated that the employer need not permit access for the solicitation of membership. Thus the Board is discriminating against employees who wish to acquire the benefits of membership by joining a union, in favor of those who wish to acquire the benefits of union membership through the payment of delinquent dues and regaining good standing.

Point V.

Since petitioner's main brief was filed the Circuit Court of Appeals for the Second Circuit has rendered its decision in *N. L. R. B. v. Standard Oil Co.* case, No. 7, November 1, 1943, 13 L. R. R. 314, wherein that court:

1. Recognized that its prior interpretations of the *Express Publishing Co.* case have been incorrect, and that the jurisdiction of the Board to enter cease and desist orders is limited "to those unfair labor practices of which the employer had been found guilty." Thus, the Second Circuit now recognizes the invalidity of blanket cease and desist orders, but it did not have the courage to overrule its prior decisions;

2. Recognized that "the Board uniformly incorporates the (blanket) clause in its order." Thus the Second Circuit has come to realize that the Board has not been deterred from its singleminded purpose of administering the Act just as it sees fit, regardless of limitations upon its power contained in the Act either expressly or by judicial interpretation thereof, leaving the employer in the position of having to accede to the unlawful orders of the Board, or taking the time and spending the money necessary to invoke the protection of the Court. The result of this is that many unlawful orders go unchallenged, for many employers do not or cannot appeal them.

Summary.

Reduced to its simplest terms the Board's contention in this case is that it is necessary, in the Board's opinion, that shore representatives of the complaining unions be given free access to your petitioner's vessels so that your petitioner's employees may more effectively enjoy the benefits of the Act; and that, therefore, the Board may require access under its broad power to effectuate the policy of the Act, even though there is no express provision in the Act to cover. In this connection, on pages 22 and 23 of its brief, the Board in effect asserts that Congress granted to the Board the power to take whatever action the Board, in its judgment, considers will "effectuate the recognized legislative objectives of the Act."

Admittedly the Board has broad power, but even such broad power has its limitations. *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31, 46; 86 L. Ed. 1246. The Board is not the "guardian or ruler" over employees of your petitioner. *Humble Oil & Ref. Co. v. N. L. R. B.* (C. C. A. 5), 113 Fed. (2d) 85, 88; and the Board cannot "substitute its own ideas of discipline and management for those of the employer." *N. L. R. B. v. Williamson-Dickie Mfg. Co.*, 130 Fed. (2d) 260, 267.

We submit that if the Board has the power to dictate the terms and conditions of employment so far as they concern the settlement of grievances, unquestionably one of the most important clauses in a contract, the Board also has the power to dictate the wages, hours and other

conditions of employment, for the Board, bent on sustaining the cause it championed when acting in the role of accuser, would have no trouble conjuring up reasons why, in its opinion, the working of employees during certain hours would interfere with their participation in union activities or that a low wage paid for certain work would interfere with a worker's right to acquire the benefits incident to union membership because that low wage prevented him from paying the initiation fee and dues necessary to full enjoyment of the benefits conferred by the Act.

Conclusion.

Other contentions made by the Board in its brief, we submit, are patently fallacious or fully discussed in our main brief and require no discussion here.

Respectfully submitted,

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December 28, 1943.